PROCEEDINGS IN MEMORY OF MR. JUSTICE VAN DEVANTER.

Members of the Bar of the Supreme Court of the United States met in the Supreme Court Building on Monday, March 16, 1942, at 10 o'clock a. m.*

The meeting was called to order by Mr. Solicitor General Fahy.

MR. FAHY said:

This meeting of the Bar of the Supreme Court was called to honor the memory and the life of Mr. Justice Willis Van Devanter. The purpose of the meeting has met feeling response. Willis Van Devanter lived from April 17, 1859 to February 8 of last year. For 27 years prior to his retirement on June 2, 1937, he was an Associate Justice of the highest court of his country. When his soul passed on, there remained the enduring influence of his work and character. He had long enjoyed not only the respect and regard of those privileged by his personal association and friendship but the recognition of worth intuitively conferred by all upon one who ably and faithfully administered the public trust. Custom accords with aspiration when those who still attend his court meet to pay honor to him. We do this not simply in tribute but with fruitfulness to ourselves.

On the motion of MR. SOLICITOR GENERAL FAHY, MR. GEORGE WHARTON PEPPER was elected Chairman, and MR. CHARLES ELMORE CROPLEY, Secretary.

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*The members of the Committee on Arrangements for this meeting were: Mr. Solicitor General Fahy, *Chairman;* and Messrs. John Spalding Flannery and Charles Warren, of Washington, D. C.; Charles B. Rugg, of Massachusetts; and Michael J. Doherty, of Minnesota.

On taking the Chair, MR. PEPPER said:

Most of those here assembled have taken part in many memorial meetings. On such occasions our states of mind have differed widely. Not seldom the sentiments expressed were tainted with unreality. Sometimes the man in his lifetime had been merged in the judge to such a degree that we remembered him merely in terms of views held and opinions written. Occasionally the meeting was obviously a gathering of personal friends moved by a genuine desire to express deep feeling. I take it that this is a gathering of that sort. Each of us, in the passing of Mr. Justice Van Devanter, has experienced a personal loss. Each of us welcomes the opportunity to testify to our admiration for the man and appreciation of the courtesies and kindnesses of which we severally have been the recipients.

Apart from appearances before him as a Justice of the Court and in addition to friendly contacts with him at other times, I had the unusual opportunity to see him in action during the international controversy over the sinking by our Coast Guard of the rum runner styled the "I'm Alone." Representing the United States in that controversy, I had occasion to appear before the two Commissioners appointed under the Convention between the United States and Canada. Mr. Justice Van Devanter was one and the Chief Justice of Canada, Sir Lyman Poore Duff, was the other. The tribunal sat both in Washington and in Ottawa. In advance of the hearings, I had been apprehensive that no conclusion could be reached by a two-man court, each member of which was identified in interest with one of the litigants. The apprehensions were groundless. A statesman-like view of the situation and a judicial approach to the various problems involved, characterized the conduct of both Commissioners. The result jointly reached approximated perfect justice and happily ended a most troublesome international episode.

I do not propose, however, to take advantage of my position as presiding officer to express myself at length about the Justice. I wish merely to place on record the fact of affectionate regard for a friend and of high admiration for a man who embodied the qualities which we most like to associate with America. At a moment of crisis and with our country at war, I cannot better summarize my testimony than by suggesting that a regiment of men of the type of Willis Van Devanter would prove invincible no matter by what force confronted.

MR. PIERCE BUTLER, JR., on behalf of the Committee on Resolutions,* submitted a Minute and Resolutions, which will be found in the address made later by the Attorney General in presenting them to the Court. See *post*, pp. XXIX–XXXIV.

The meeting was then addressed by Messrs. Charles E. Hughes, Jr., William D. Mitchell, and John W. Davis.

MR. HUGHES said:

When Mr. Justice Van Devanter retired from the Supreme Court of the United States in May of 1937, he had sat upon that Bench for upwards of twenty-six years, a long span even when measured in relation with the traditions of that Court. He took his seat on January 3,

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*The members of this Committee were: Mr. George Wharton Pepper, of Pennsylvania, Chairman; Messrs. Oscar W. Underwood, Jr., of Alabama; Garret W. McEnerney, of California; William V. Hodges, of Colorado; George E. Hamilton and G. Carroll Todd, of the District of Columbia; Silas H. Strawn and Luther M. Walter, of Illinois; Richard N. Elliott and Frederick Van Nuys, of Indiana; Frederick F. Faville, of Iowa; William Marshall Bullitt, of Kentucky; Roscoe Pound, of Massachusetts; Pierce Butler, Jr., and Frederick H. Stinchfield, of Minnesota; James A. Reed, of Missouri; Henry W. Taft and Thomas D. Thacher, of New York; J. Crawford Biggs, of North Carolina; Robert A. Taft, of Ohio; Streeter B. Flynn, of Oklahoma; Walter P. Armstrong and William L. Frierson, of Tennessee; Hatton W. Sumners, of Texas; Warren R. Austin, of Vermont; George Donworth, of Washington; and Joseph C. O'Mahoney, of Wyoming.

1911, when Mr. Justice White had only recently been appointed Chief Justice. He was then only fifty-one years of age. But he brought to the Court a rich background of learning, experience and wisdom.

He was a native of Marion, Indiana, and for the first three years after his graduation from the University of Cincinnati Law School in 1881 he practiced law there with his father, a successful lawyer of that town. But the prospect held out to him by a brother-in-law, of identifying himself with a pioneer community in the Far West, presented attractions that proved irresistible. And in 1884 he took his bride of a few months to Cheyenne, Wyoming.

Wyoming was then a Territory and a turbulent one. Its heterogeneous population had as yet made no great progress towards the organization of an orderly society. There was no overcrowding of the Bar at Cheyenne, and a lawyer of the attainments and physical and mental vigor of Willis Van Devanter was destined for rapid recognition and preferment. Two years after coming there, and when only twenty-seven years old, he was appointed Commissioner to revise the Wyoming statutes; the next year City Attorney of Cheyenne; and a year after that he became a member of the Territorial Legislature, in which he served as Chairman of the Judiciary Committee.

The following year, 1889, he became Chief Justice of the Supreme Court of Wyoming. The judicial business of that Court was not large and its justices sat in the lower courts as well. It was during the ensuing year of his incumbency that Wyoming became a state. The Supreme Court of the State was organized in October of 1890. He was elected to it, and became its Chief Justice also, but resigned within a few days thereafter.

Following his resignation from judicial service, Mr. Van Devanter plunged again into the practice of the law. It was a successful and rewarding practice, and he num-

bered among his clients the Union Pacific Railroad and important land, cattle and irrigation companies. He was also drawn more prominently into politics. He became Chairman of the Republican State Committee in 1892; a member of the Republican National Committee in 1896; and was a delegate to the Republican National Convention of that year, which nominated Mr. McKinley for President.

He had then lived for twelve years in an expanding pioneer community, and had played a leading part in its emergence to statehood and stability. It is difficult to imagine an environment more likely to develop the strength and steadiness of character and understanding heart which, coupled with superior native intellectual capacity, are the best equipment for public service. Both in his practice as an attorney and in his political activities he literally "rode the circuit," traveling on horseback from one settlement to another, and spending his nights in hostelries where all elements of the community mingled; and with all of them he was on terms of intimacy. It was his law practice during those years which laid the foundations of his knowledge of public land law, Indian affairs, and the law of western water rights, of which subjects he became an acknowledged master.

In 1897 President McKinley appointed him Assistant Attorney General of the United States in charge of the legal work connected with the administration of the public land laws by the Interior Department. He remained for four years in that post, which afforded unusual opportunities for further developing his learning in that field. During those years also Mr. Van Devanter indulged those scholarly tastes, which had always been a conspicuous part of his make-up, by serving as professor of equity pleading and practice and equity jurisprudence in Columbian (now George Washington) University Law School.

In 1903 President Theodore Roosevelt appointed him Judge of the Circuit Court of Appeals for the Eighth Cir-

cuit. His accession added great strength to a court which was already a distinguished one. Judge Walter H. Sanborn was on the court when Judge Van Devanter joined it, and Judge Hook came to it later. The wide range of the jurisdiction of the Circuit Court of Appeals, covering every department of the law, especially in the federal field, gave him the opportunity to broaden the scope of his learning; and his industry and accurate memory enabled him to make the most of it. His seven years as Circuit Judge was a period of conspicuous growth in all the qualities which make a great judge. He established a high reputation as one of the ablest members of the federal judiciary. When, in December 1910, President Taft appointed him as Associate Justice of the Supreme Court of the United States, the fitness of his choice was widely recognized.

Upon the work of the Supreme Court, Mr. Justice Van Devanter left an enduring mark. He was not a judge of whom the public generally could gain any very sharply defined impression. He was quiet and unassuming, and appeared seldom in public. He made very few speeches, even before gatherings of lawyers, and those were of the conversational and unpretentious sort. He left practically no writings except his opinions. But his comprehensive learning, his industry, his passion for thoroughness and exactness, and his power of clear analysis and forceful exposition marked him, among all those who really knew the work of the Court, as one of its most conspicuously valuable members. It is impossible within the limits of remarks such as these to attempt any survey of the opinions which he wrote during the twenty-six years of his service upon the Court. It is enough to say that they comprehended most of the fields within the Court's jurisdiction, and that, to whatever subject they related, they were characterized by a lucidity and assurance which comes only from complete mastery of principles and precedents. It is safe to say also that there were many opinions, not

written by him, which were profoundly influenced by his penetrating analyses in the conferences of the Court.

It was indeed in conference that his most distinguished contribution to the work of the Court was made. This quality ordinarily cannot be known to the Bar, but may only be surmised. But, in the case of Mr. Justice Van Devanter, we have the authoritative testimony of two of the three Chief Justices with whom he served. Chief Justice Taft spoke of it in a letter to the President of Yale University in December 1926, which has been published in Henry F. Pringle's book, "The Life and Times of William Howard Taft." In suggesting Mr. Justice Van Devanter for the honorary degree of LL. D., which Yale awarded him the following June, he said:

"The value of a judge in conference, especially in such a court as ours, never becomes known except to the members of the court. Now I don't hesitate to say that Mr. Justice Van Devanter is far and away the most valuable man in our court in all these qualities. We have other learned and valuable members, with special knowledge in particular subjects, but Van Devanter has knowledge in every subject that comes before us."

Over eleven years later, at the Annual Meeting of the American Law Institute in May 1938, which was the first after Mr. Justice Van Devanter's retirement, Chief Justice Hughes, in the course of paying tribute to his judicial service, said this:

"In the discharge of its work the conference of the Court is of the greatest importance, as there the Court discusses and decides the cases which have been heard and passes upon the applications for permission to be heard. It was in that conference that Justice Van Devanter's wide experience, his precise knowledge, his accurate memory, and his capacity for clear elucidation of precedent and principle, contributed in a remarkable degree to the disposition of the Court's business. . . . Few judges in our

history have rivaled him in fitness, by reason of learning, skill and temperament, for the judicial office."

The confidence which the Court reposed in Mr. Justice Van Devanter led to his selection on frequent occasions for undertakings outside its strictly judicial work. His outstanding service of this nature was in connection with the Jurisdictional Act of February 13, 1925, of which he was the draftsman and the chief expositor in the hearings before the Judiciary Committees of the Senate and House of Representatives. It was the most important judiciary measure since the Circuit Court of Appeals Act of 1891.

The main objects of the bill were the relief of the congestion of the Supreme Court docket, and the codification and correlation of the jurisdictional statutes. The Bar has become so accustomed in late years to see the Supreme Court end its term with all cases which were ready for hearing disposed of, that it is difficult to recall the conditions which necessitated this reform. By the early 1920's the calendar had been, for years, seriously in arrears. Some relief had been obtained from the Act of September 6, 1916, which greatly curtailed writs of error from state courts. But its effect on the Court's obligatory jurisdiction with respect to review of decisions of the Circuit Courts of Appeals was slight, and it did not affect cases coming from the District Courts, the Court of Claims, and the Court of Appeals of the District of Columbia. The enormous increase in federal activities during and after the first World War so augmented the judicial business of the lower federal courts as to more than overcome the diminution of cases from the state courts. By 1921 it required between something more than a year to something less than two years for a case to be reached for argument after its docketing, and there was grave ground for apprehension that the calendar would soon become even more congested.

A committee of the Court was appointed to formulate a plan for relief, chiefly by cutting down the field of ob-

ligatory jurisdiction and widening that of discretionary review by certiorari. The first chairman of that committee was Mr. Justice Day, but he retired in 1922, and Mr. Justice Van Devanter then became chairman and Mr. Justice Sutherland was added. At the time of the submission to Congress of the bill which became law, the Court's committee consisted of Justice Van Devanter, Chairman, Justices McReynolds and Sutherland, with Chief Justice Taft, who gave his strong support throughout, member ex officio. The committee's draft was submitted to the whole Court and upon its approval presented to Congress.

Mr. Justice Van Devanter's characteristic comprehensiveness and precision of statement were admirably exemplified in his exposition to the committees of Congress of the need and purposes of the bill. He presented and explained an analytical tabulation of the business of the Supreme Court for the preceding ten years, with more detailed particulars as to the October terms of 1922 and 1923. The cases coming to the Supreme Court had increased from 530 in 1914 to 731 in 1923. The number of cases left over at the end of the term were 536 in 1914; and in 1923, in spite of the partial relief afforded by the Act of 1916, were still 462, with an upward trend clearly discernible. The cases coming as of right from the Circuit Courts of Appeals, the District Courts and the Court of Claims were the most fruitful field for diminution of the obligatory docket. Manifestly, many of these cases, of which those arising under the Federal Employers' Liability Act and ordinary contract cases in the Court of Claims were outstanding examples, were not of the sort with which the Supreme Court should have been concerned. As Mr. Justice Van Devanter said, in defending the bill before the Judiciary Committee of the House: "It is not too much to say that one-third of the business which now comes to the Supreme Court results in no advantage to the litigants"; and, after an analysis of his reasons for that

statement, he continued: "Of course, in proportion as our attention is engaged with cases of that character, it is taken away from others which present grave questions and need careful attention."

The bill did not take out of the appellate jurisdiction of the Supreme Court any case that was within that jurisdiction under existing law. It simply transferred large classes of cases from the obligatory jurisdiction to the discretionary jurisdiction. Its further aims, as explained by Mr. Justice Van Devanter to the committees, were to bring together in a single enactment all of the statutes relating to the appellate jurisdiction of the Supreme Court and of the Circuit Courts of Appeals and to correlate and harmonize the jurisdictional statutes.

The bill was not a complete revision of the Judicial Code. That could not have been done, as Chief Justice Taft once said, without a corps of assistants whose time would be exclusively devoted to it. It would have been a task beyond the capacity of the Supreme Court directly to assume. As a practical matter, it is probable that the very fact that the bill was one of definite and limited objectives, which could be readily explained to and understood by the Congress, greatly facilitated its passage.

Its effect on the congestion of the calendar of the Supreme Court was quickly felt. At the end of the October term of 1927, only 190 cases were carried over undisposed of, as compared with 295 at the end of the October 1926 term. By the October 1929 term, the Court was hearing argument on cases docketed during that same term, and for the first time in many years no case that had been submitted was allowed to go over. By the October 1930 term, the Court was more likely to be ready to hear argument than counsel were to present it; and this condition has prevailed in increasing degree ever since.

An opportunity for service outside the Court came to Mr. Justice Van Devanter in 1929, when he was named Commissioner for the United States in the case of the Canadian rum-runner "I'm Alone," which in that year was

sunk by the Coast Guard some two hundred miles off Louisiana. Sir Lyman Poore Duff, Chief Justice of Canada, was the Commissioner for Canada. The final report of the Commissioners, rendered after hearing extensive evidence and oral argument, was a striking example of the independent and objective approach of judges imbued with the traditions of American and British judicial systems, even to controversial international issues. The "I'm Alone" had been engaged in carrying liquor from British Honduras through the Gulf of Mexico to points convenient to Louisiana, from which the vessel was unloaded and the liquor smuggled into the United States. It was found that the vessel was *de facto* owned and controlled by a group composed primarily of United States citizens and therefore no compensation should be made in respect of the ship or its cargo. It was further found, however, that the sinking was not justified either by international law or by the Convention of January 23, 1924, between His Majesty the King and the President of the United States, and Mr. Justice Van Devanter concurred in the recommendation against his Government that "the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government."

Mr. Justice Van Devanter's judicial service did not wholly end with his retirement from the Supreme Court of the United States. In December 1937 he accepted an assignment to sit in the United States District Court for the Southern District of New York, and in January and February of 1938 he presided over a series of criminal trials there. The circumstance of a judge who had been so long and so recently a member of the highest court of the land conducting jury trials was an arresting one and

attracted wide public interest and a more than capacity attendance. His conduct of the court was a revelation to members of the Bar and laymen alike. His early years as a trial lawyer and a continuous aggregate of thirty-four years of service on appellate courts, in which records of trials were constantly passing under his scrutiny, gave him such a complete mastery of rules of substantive law, procedure and evidence that his application of them appeared instinctive. The trials were models of expedition, without sacrifice of fairness or courtesy to litigants, witnesses or counsel. On two occasions he remained at the Federal Building until long past midnight, once until after two o'clock to receive a verdict, and once until after four o'clock to prepare a charge which he, although then suffering from a cold, was on hand to deliver to the jury at ten o'clock the same morning. There can be no doubt that such strains, at his age, impaired his health and hastened his end.

And so Mr. Justice Van Devanter's judicial career ended, as it had begun and continued throughout its long course, in faithful and unselfish devotion to the institutions of which he was so distinguished a part. His labors and the spirit which animated them are for lawyers to admire and for judges to emulate.

MR. MITCHELL said:

Perhaps the best contribution I can make on this occasion is to record some personal impressions of Mr. Justice Van Devanter, gained by an acquaintance of nearly forty years.

I first knew him in 1903 in Saint Paul, when, newly appointed United States Circuit Judge for the Eighth Circuit, he was attending a term of court. Though only forty-four years of age, his life had been crowded with interesting experiences.

His early experience as a farmer in Indiana, his turning to the law, and removal to the Territory of Wyoming; his service there in codifying the laws of the Territory, as a

member of the House of Representatives of the Territorial Legislature, as City Attorney in Cheyenne, and as Chief Justice of the Territorial and of the State Supreme Courts; his later activities there as a practicing lawyer from 1890 to 1897, including participation in the struggle to maintain law and order in Wyoming, during the period when cattle rustlers and outlaws seemed too strong for constituted authority, and vigilantes were substituting for lawful government,—all these incidents have been described in the resolutions you have just heard.

His political contacts during that time, as Chairman of the Republican State Committee, member of the Republican National Committee and delegate to a Republican National Convention, seem to have turned his attention toward Washington, and in 1897 he was hopeful of appointment as Solicitor General, but the affairs of the Interior Department were in a somewhat sorry state, and President McKinley asked him to take the post of Assistant Attorney General in the Interior Department. He accepted, and served with distinction in that office for six years; and there acquired a complete knowledge of the law and regulations of the Interior Department relating to public lands and Indian affairs. Then in 1903 he was appointed, by President Theodore Roosevelt, United States Circuit Judge.

That was his background when I first knew him.

Anyone meeting him would have thought, "Here is a man with great physical vigor, a powerful intellect and a driving and dominant personality." The unusual physical strength with which nature endowed him had been seasoned and conditioned by outdoor western life, and this equipped him to satisfy his high sense of responsibility for the proper discharge of his judicial duties by working long hours.

Notwithstanding this serious absorption in his work, he was not without a sense of humor, but it was not of the

frivolous or merry sort, and was always dignified. His contacts with men and affairs had given him an understanding of human nature and great tact and sagacity in dealing with his fellow men. That, added to his obvious physical and mental powers, made him a dominant figure and a compelling influence in any company.

The impressions of him gained at that time remained with me in all the after years. Commencing in 1925, and during my years of service in Washington, old acquaintance, as well as official duties, brought me frequently in contact with him. Many thought him unusually austere, but he was not so to his friends. He was dignified and somewhat reserved, even in his family life, but always courteous and considerate, and on his wife lavished a gentleness and loving care which was all the more noticeable because of his forceful personality.

On the bench, he exhibited on some occasions what might be described as withering severity towards lawyers appearing before him. But I learned, through frequent attendance in the Supreme Court Room, that in these instances the unfortunate object of his attentions invariably had been guilty of some impropriety or of misstatement. And the attorney who, through ignorance or by intention, made an unfair statement of fact, or evaded or placed a gloss upon the truth, was likely to have a rough time with Mr. Justice Van Devanter. Normally he was extremely courteous and kind to counsel, and disposed to be helpful to the diffident and inexperienced. More than once, after adjournment, I have seen him leave the bench and come forward and speak kindly and encouragingly to some young lawyer who had made his first appearance before the Court. In the same spirit, he was very kind and helpful to me. During my early experiences as Solicitor General he found the opportunity, very tactfully, and privately, to suggest ways of improving my court manners. I learned through him how im-

portant it is that the Solicitor General, whom the Court must listen to week in and week out for years, should be free from annoying mannerisms. The Court can stand them on occasions, but as a steady diet they become quite unbearable.

It has been remarked that he did not write and hand down his opinions with rapidity, and it was his habit both as a Circuit Judge and as a Justice to keep under advisement for considerable periods cases assigned to him for opinion. Some have wondered if this was because his mental processes were slow. But that was not the cause. He had an unusually quick mind and wonderful capacity to go immediately to the heart of a case. I was once told by a member of the Court that it was an interesting experience to sit in the conference room and listen to Mr. Justice Van Devanter, when called on for his views, state the facts and the law and his conclusions clearly and unhaltingly and with masterly logic; and that, if a shorthand reporter could have been present to record Justice Van Devanter's statements in conference, the transcript would have supplied a powerful and orderly opinion suitable for delivery with little alteration. Nevertheless, when cases were assigned to him, he labored long in the preparation of opinions. That was due to his deep sense of responsibility and to his anxiety to be thorough and accurate to the last degree. He could have tossed off opinions with the greatest readiness, but he would not. Of the scores of times in Washington when I dropped in to see him at his home, at any hour of the day or evening, I cannot remember that I ever failed to find him, in his study, surrounded by printed records and briefs and volumes of the Supreme Court Reports, and busy with his judicial work.

I speak of these things because they emphasize his overwhelming sense of the responsibilities of his high office. Only tremendous physical vigor made such labor possible.

The result is disclosed in his published opinions. No defeated lawyer could complain of any inaccuracies in the Justice's statements of fact or of any failure to grasp and fairly state the questions involved. Furthermore, his style is simple and clear. He was not a phrasemaker and he did not import into his vocabulary words having no settled meaning in the law. His opinions are wholly free from such affectations. No one can fail to understand his reasoning and his conclusions; and, above all, his opinions not only dispose of the cases under consideration, but furnish to the profession a guide and a chart for the future. In various branches of the law his knowledge was so complete and accurate that the Court leaned on him heavily, as some of its members have frequently said. His experience in the west, together with his years of service in the Interior Department, had given him a knowledge of the law relating to public lands, Indian affairs, water rights, navigable waters, railroad land grants, and related subjects, more profound and complete than that of any other Justice who ever sat upon the Court.

From one point of view, it is to be regretted that he expended such a wealth of learning and experience on branches of the law which are rapidly losing their importance through changed conditions, but it must be remembered that there was a long period in which these subjects were of vital importance to the development of the west and to the entire nation.

In knowledge of the jurisdiction and powers of the federal courts under the Constitution and Acts of Congress, he had no superior. An illustration of this is found in the Act of February 13, 1925, in the drafting of which he took a major part, and which reorganized the manner of invoking the appellate jurisdiction of the Supreme Court. That Act was a product of such a thorough knowledge and is so carefully drawn that, during the seventeen years since it was enacted, no doubts as to its interpretation and effect have arisen.

The indelible impressions left with those who knew him are: his possession of physical vigor and a powerful intellect, vast and accurate knowledge of many branches of the law, and particularly of those bearing on the operations of the Federal Government and the functions of the Legislative, Executive and Judicial branches; an understanding of human nature, and a tact, which were effective in his contacts with others; the force, the industry, and the perseverance to accomplish his objectives; and a high sense of responsibility for the proper performance of his judicial functions and of his duty to the Court and to the nation, which governed his course during his years upon the bench.

Finally, there is something to be said of Mr. Justice Van Devanter's views on those questions affecting the powers of government under the Constitution over the economic affairs of the citizen—questions which gave rise to so much controversy during his latter years upon the Court. Broadly stated, they related to the extent to which government could by regulation or regimentation restrict the economic freedom of the individual. It has been said that, in controversies of that sort in past years, the predilections of the Justices, born of their experiences with human affairs, have tended to affect their conclusions. To some degree, that has doubtless been true in the past. It is no less true at present, and it will be true in the future, as long as judges are human. Because of that, it has also been said that a Justice of the Supreme Court should not only be a great lawyer, but something of a statesman as well. It is too much to expect that his experience in human affairs should have no effect on a judge's conception of the functions of government.

If we look back once more at Justice Van Devanter's experience before he went upon the bench, we may find the seeds of his judgments. The Far West had been the field of his early endeavors during a period when there was still a frontier, where a man had to win his own way, and

there was almost complete economic freedom, and individual initiative had its opportunity. There, a man with industry, character and brains earned success, the fruits of which, if honestly attained, he was allowed to enjoy.

It is not hard to understand why Mr. Justice Van Devanter should have believed that economic freedom is necessary to human happiness, and that other traditional liberties guaranteed by the Bill of Rights, such as freedom of speech and of the press, vital as they are, may not be enough, and indeed may disappear if economic freedom is lost. His opinions show that he believed that the regulative power of government over the economic affairs of people should be confined as far as practicable to the prevention of definite abuses and dishonesty; and that, under the Constitution, intimate interference with economic freedom and individual initiative is only justified where there is a definite showing that abuses have arisen which in the public interest require governmental interference; and finally (and here is where the controversy centered) he believed that it was the function of the courts to consider for themselves whether there was a substantial basis for legislative interference. The legal question whether, under the due process clauses of the Constitution, the courts may interfere with the judgment of legislative bodies that economic regulation is necessary, has been definitely, and doubtless finally, resolved contrary to Mr. Justice Van Devanter's views. But in the court of public opinion the question whether human happiness and liberty will be best served by governmental planning of, and intimate control over, the economic affairs of the individual, is far from settled. However, not for years can this question of policy again be a live one. With war upon us, the regulation and regimentation by government of the minute details of the economic affairs of the citizen are becoming necessary and will become more complete as war continues; and, even when peace comes, that system cannot suddenly end, but may be with us during the con-

siderable period when government must direct the gradual transformation of our economy to peace-time basis.

The issue as to whether Mr. Justice Van Devanter's philosophy of government, as distinguished from his views about the functions of the courts, was right or wrong is, for the time being, relegated to the background. On this occasion, what we of the Bar think on these matters is of no consequence. We can, without exception, join in acclaiming his patriotism, the conscientious devotion of his great abilities and enormous labors to the public interest, and the long and distinguished service he rendered the nation.

Mr. Davis said:

When we meet as members of the Bar to commemorate the life and service of a lawyer or a judge, it would be vain for us to believe that by such ceremonies we can add anything to the stature or the fame of him who has gone. The book of life has been closed, and the pages written by himself must stand before history as his own best memorial. Our purpose, rather, is to express our gratitude for his contributions to the science we revere and to the profession of which we are the devotees. We owe it also to posterity to picture the man as we saw him in those things which escape the printed page; hoping that, looking upon this portrait, they may be stimulated, in their turn, to follow his example. "Show me the man you honor," runs the saying, "and I will show you the man you are." I could wish nothing better for American lawyers and judges than that they should continue to honor Willis Van Devanter.

I cannot, nor can anyone else who knew him, speak of him save with words of admiration and affection. My personal acquaintance with him covered a span of nearly thirty years; and, while in that period I heard many words of praise concerning him, I do not recall any expression of criticism or censure, ill-feeling or reproach. So staunch was he and so courageous and so firm, and yet withal so

kindly and sincere, that no envious shaft ever flew in his direction. Had it done so, we may be sure that the integrity with which the man was armored would have turned it aside.

The universal approval with which his appointment to the Supreme Court by President Taft in 1910 was received is eloquent of the position he had then attained. The expectations to which his reputation gave rise were amply vindicated by his twenty-seven years upon that Bench. He came to it with an experience and equipment quite unusual in variety and scope. First in Indiana, and then in Wyoming, he had been an active practitioner at the Bar, seasoned by the trial of all sorts of cases. He had been Chief Justice, first of the Territory and then of the State of Wyoming, and had had experience both on appeal and as a judge at *nisi prius*. He had been a member of the House of Representatives of the Territory of Wyoming when its laws were in the making. There followed six years in Washington as Assistant Attorney General for the Interior Department, with duties even more multifarious and important than the mere title would suggest; to which he added the labors of a professorship of equity jurisprudence, pleading and practice at Columbian University. Thence he went to the Circuit Court of Appeals for the Eighth Judicial Circuit; and from that Bench he was called, seven years later, to the Supreme Court. Thus, at one time or another he held commissions from four Presidents—Harrison, McKinley, Roosevelt and Taft—and in each instance he justified their confidence.

So he brought with him to the Supreme Court forensic, legislative, administrative, professorial and judicial experience. He brought something else of no less value, in his wide acquaintance with men and things. Wyoming was still pioneer territory when he went there in 1884. Human nature was exhibited without artificial veneer or disguise. A new social and political community was

being born, and as it grew so he grew with it, taking part in all of its activities and forming, consciously or unconsciously, the philosophy by which he was to guide his later life. In the rough and tumble of local and national politics, in the give and take of a life lived largely in the open, he learned to measure men for what they were and to mark the difference between the true metal and the base. I think I never knew a man whose judgment in this respect was more unerring or who had a more wholesome and withering contempt for what he regarded as sham or pretense.

When one thinks of him in his character as a Judge, certain things seem to stand out. Of these, the first was his intense industry and devotion to duty. He gave himself without reserve and with entire concentration to any and every task that was set for him. Indeed, it is said that when he was in the Department of the Interior his secretary lived in his home and the work of the two went on during all waking hours. So during the sessions of the Supreme Court he allowed himself few diversions, either by day or night. His mind, as it seems to me, worked surely rather than swiftly and could be at rest only after enough time had been spent to bring about a fully matured conclusion.

This intensity of effort was reflected in his written opinions by their eminent directness and clarity. The function of a Judge as he conceived it is to ascertain the facts, to apply to them the pertinent rules of law, and then to pronounce the result in terms that not only lawyers and litigants but laymen might easily understand. A man of simple personal tastes and habits, this simplicity was reflected in his written style, which was Doric rather than Corinthian in its architecture. There was no striving for adornment, no search for novel words, no effort to coin epigrams. At the moment, I do not recall a single sentence of his that might be called epigrammatic. Indeed, I think he distrusted such devices. He aimed to be

a Judge and not a litterateur, and endeavored always to make his meaning so plain that a wayfaring man could not mistake it. And this I take to be the quintessence of merit in a judicial utterance.

He was a genuinely open-minded man. I suppose he had his prejudices, as do the rest of us; and he certainly was not lacking in personal convictions. But, so far as the limitations of human nature would allow, he laid his personal predilections aside in considering the cases brought before him. He did not consciously permit his views of general policies to turn him from the strict application of the law he was called on to administer. *Jus dicere, non jus dare* was the motto he adopted for himself. When he asked questions from the Bench, as he frequently did, there was a certain challenging bluntness, almost a gruffness, in his manner, which was often disconcerting to an inexperienced advocate and gave a quite mistaken impression as to the fixation of his own mind on the subject under discussion. But the manner meant nothing more than that he was either seeking for light himself or trying to strip the argument of its nonessentials, or sometimes perhaps testing the depth of the advocate's preparation.

No doubt it was this open-mindedness, together with his broad knowledge of principles, that made him so invaluable in the conference room. I have heard the statement from Chief Justice White, who leaned on him heavily, that in the conference he was the most helpful member of the Court. More than one of his judicial brethren have expressed the same opinion. In special fields, such as matters of jurisdiction and procedure, land and water rights in the western states, or on Indian questions, he had a profound and preëminent knowledge which his colleagues gladly recognized.

Being what he was, it was inevitable that he should set a high value on established precedents. He fully realized, I think, that the judicial department, lacking both the purse and the sword, has one weapon, and one only, by

which its independence and permanent influence can be maintained. That weapon (and it is a weapon of potency) consists of the implied threat, or implied promise, or implied obligation, whichever you will, that when questions decided in one case arise in another they will be disposed of in the same way. Lacking this, the momentary decisions of any court of last resort can have but little significance to any person other than the immediate litigants.

A hasty search reveals but two of Justice Van Devanter's opinions in which prior decisions were overruled. In one, *Lee* v. *Chesapeake & Ohio Ry.* (260 U. S. 653), dealing with the right of removal, the Court overruled *Ex parte Wisner* (203 U. S. 449), in order, as the opinion points out, to return to the sounder rule announced in earlier cases. And in *United States* v. *Nice* (241 U. S. 591), involving the statutes forbidding the sale of intoxicants to Indians, the earlier case of *Matter of Heff* (197 U. S. 488), was overruled in the light of later enactments. Although he was not insensible to the course of legal evolution, I question whether he could have brought himself to overrule or ignore an earlier decision on the mere ground that had he been then upon the Court he would have reached a different conclusion.

I presume it would be fair to speak of his attitude on Constitutional questions as that of a strict constructionist, although that term has taken on such varied shades of meaning in the course of American history that it has lost much of its descriptive value. But it may be applied to Justice Van Devanter in the sense that constitutional grants, constitutional limitations and constitutional prohibitions were to him very real and sacred things. He adopted as the fundamental bases of his thinking the doctrines of powers delegated and powers reserved, of the separate spheres for state and federal action, and of the duty of all to rigidly observe the rules of conduct the Constitution has prescribed. Thus, firmly anchored in principle, he accepted fully his responsibility as a Judge to

preserve, protect and defend the Constitution as he found it, leaving to the people their right to alter or amend.

Such, Mr. Chairman, is in barest outline the appraisal I would make of Justice Van Devanter. I realize its inadequacy and I am glad that there are others who can do better justice to the theme. But recognizing in him the figure of a learned, just and upright judge, I gladly join in this tribute to his memory.

The Resolutions were then adopted and the meeting adjourned.